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U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUN 21 2004

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in February 1996. It imports and exports industrial goods. It seeks to employ the beneficiary as its general manager of operations. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director observed that the petitioner had not submitted supporting documentation with its petition. The director noted that the petitioner had been given an opportunity to submit evidence and had sent a partial response. Based upon a review of the original petition and the subsequently submitted response, the director determined that the petitioner had not established: (1) a qualifying relationship with the beneficiary's foreign employer; (2) that the foreign entity was doing business, thus maintaining the multinational aspect of the petitioner; or, (3) its ability to pay the beneficiary the proffered annual wage of $50,000.

On appeal, counsel for the petitioner acknowledges that the petitioner's agent sent a partial response to the director's request for additional evidence. Counsel claims that the failure to submit all the requested evidence was due to the petitioner's former agent who is not an attorney and who was overwhelmed by the magnitude of the resources and operations of the petitioner and the foreign entity. Counsel submits evidence on appeal that he contends address the deficiencies in the record on the issues of: (1) the petitioner's qualifying relationship; (2) the foreign entity and the petitioner doing business; and, (3) the petitioner's ability to pay the beneficiary the proffered wage.

Section 203(b) of the Act states in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the beneficiary has established a qualifying relationship with the beneficiary's foreign employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity.

The petitioner did not submit evidence with the petition establishing a qualifying relationship between the petitioner and the beneficiary's foreign employer. On May 9, 2003, the director requested evidence that would establish a qualifying relationship. The petitioner did not submit any information regarding an affiliate or subsidiary relationship with the beneficiary's foreign employer in response to this request. The director acknowledged that the beneficiary had been working in an L-1A intracompany transferee status and that the beneficiary's L-1A classification suggested that a qualifying relationship had been established in the past. The director determined, however, that each petition must be based on its own merit and that the evidence in the record did not establish a qualifying relationship.

On appeal, counsel for the petitioner contends that there has been no change in the petitioner's relationship with the foreign entity since the approval of the beneficiary's L-1A classification. Counsel asserts that the petitioner is a wholly owned subsidiary of the foreign entity. Counsel submits the following documentation to substantiate this relationship:

1. Copy of Certificate of Incorporation of [the petitioner];
2. Copy of Articles of Incorporation of [the petitioner];
3. Copies of the front and back of [the petitioner's] stock certificate issuing the initial thousand (1,000) shares to [the predecessor-in-interest of the beneficiary's foreign employer] to establish the parent-subsidiary relationship;
4. Copy of the Release of Claims under Buyout Agreement assigning the [beneficiary's foreign employer's predecessor-in-interest] interest in the petitioner to [the beneficiary's foreign employer];
5. Translation of the Articles of Incorporation belonging to [the beneficiary's foreign employer] (along with a copy of the Spanish language originals);
6. Translation of the Contract for Sale of Shares in [the beneficiary's foreign employer] (along with a copy of the Spanish language originals); and,
7. Translation of the Patronal Substitution Agreement between [the two foreign companies] (along with a copy of the Spanish language originals).

On review, the AAO agrees with the decision of the director. The record does not establish a qualifying relationship with the beneficiary's foreign employer. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The purpose of

the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). When a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The AAO does not accept counsel's claim that the petitioner was not properly assisted in responding to the request for evidence. Although counsel notes that the petitioner was not assisted by an attorney but by an agent, there is no remedy available for a petitioner who assumes the risk of authorizing an unlicensed attorney or unaccredited representative to undertake representations on its behalf. See 8 C.F.R. § 292.1. The AAO only considers complaints based upon ineffective assistance against accredited representatives. Cf. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988) (discussing ineffective assistance of counsel.)

In this matter, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Should the petitioner wish Citizenship and Immigration Services (CIS) to consider the submitted evidence, the petitioner may file a new visa petition on the beneficiary's behalf that is supported by competent evidence that the beneficiary is entitled to the status sought under the immigration laws. The director's decision on this issue will be affirmed.

The second issue in this proceeding is whether the petitioner has established that it is a multinational business by establishing that both it and the foreign entity continue to conduct business.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part: "*Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States" and that: "*Doing business* means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office."

The petitioner initially did not submit evidence on this issue. On May 9, 2003 the director set out the regulation at 8 C.F.R. § 204.5(j)(3) that lists the required evidence that must accompany a petition for this visa classification. The regulation requires evidence demonstrating that the petitioner has been doing business for one year. The director specifically requested that the petitioner submit its "invoices, purchase orders, and all pages of your 2002 Income Tax [R]eturn with all W-2s and 1099s for the year 2002." The director also specifically requested "persuasive documentary evidence in the form of invoices, purchase agreements, the last three months bank statements, and all leases to show the foreign employer continues to do business."

In response, the petitioner submitted its: (1) Internal Revenue Service (IRS) Forms 1120-A, U.S. Corporation Short-Form Income Tax Returns for the years 2000, 2001, and 2002; (2) IRS Form W-2, Wage and Tax Statement issued to the beneficiary in 2002; (3) bank statements for the months of March, April, and May 2003; and, (4) invoices dated October 2002 through June 2003.

The director observed that the petitioner had provided no evidence that the foreign entity continued to do business and determined that the petitioner had not established that a foreign entity continued to do business as required.

On appeal, counsel submits: (1) summaries of import duty invoices from the petitioner to the foreign entity for the time period between February 2001 to May 2002; (2) a summary of the foreign entity's bank account withdrawals; (3) a summary of the foreign entity's bank statements from January 2002 through July 2003; (4) a summary of the foreign entity's invoices from January 2001 to June 2003; (5) a summary of the foreign entity's payroll tax contributions; (6) the foreign entity's payroll tables showing payment to over 80 employees; and, (7) a summary of the foreign entity's utility bills for the years 2002 and 2003. Counsel also submits additional evidence to establish that the petitioner is doing business. Counsel asserts that the evidence submitted on appeal establishes that both the foreign entity and the petitioner continue to do business as required by the regulations.

Again on review, the AAO agrees with the decision of the director. The record before the director did not establish that the foreign entity continued to conduct business, thus maintaining the multinational characteristic of the petitioner.[1] As stated above, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). In the present matter, the petitioner was put on notice of deficiencies in the evidence and was given a reasonable opportunity to respond to the deficiencies before the visa petition was adjudicated; thus, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the director. *Matter of Soriano, supra.* The record does not establish that the foreign entity was conducting business or continued to conduct business. The record does not establish that the petitioner is a multinational company and eligible to petition for this visa classification.

The third issue in this proceeding is whether the petitioner established its ability to pay the beneficiary the proffered wage of $50,000 per year.

The regulation at 8 C.F.R § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner initially did not submit any evidence that it had the ability to pay the beneficiary the proffered wage. The director observed on May 9, 2003 that the compensation for officers and wages could not be reconciled with the beneficiary's proffered wage. The director requested all pages of the petitioner's 2002 IRS Income Tax Return with all IRS Forms W-2s and 1099s for the 2002 year.

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[1] The record before the director also failed to establish that the petitioner had been conducting business on a regular, continuous, and systematic basis for one year prior to filing the petition. The director could and should have included this deficiency in the decision.

As noted above, the petitioner submitted its IRS Forms 1120-A, U.S. Corporation Short-Form Income Tax Returns for the years 2000, 2001, and 2002 and its IRS Form W-2, Wage and Tax Statement issued to the beneficiary in 2002. The information included:

> The 2000 IRS Form 1120-A shows $1,255,122 in gross receipts, $64,800 in compensation to officers, $0 paid in salaries, $4,224 in taxable income, and $60,334 net current assets.
>
> The 2001 IRS Form 1120-A shows $1,398,453 in gross receipts, $54,000 in compensation to officers, $29,696 paid in salaries, negative $490 in taxable income, and $59,470 net current assets.
>
> The 2002 IRS Form 1120-A shows $1,017,055 in gross receipts, $54,000 in compensation to officers, $29,460 paid in salaries, negative $30,094 in taxable income, and $30,166 net current assets.
>
> The 2002 IRS Form W-2 showed that the beneficiary had been paid $14,400.

The director determined that the petitioner had not established its ability to pay the proffered wage for the beneficiary's position. The director noted that the beneficiary had not been paid the proffered wage in the same year the petition had been filed and that in the same year, the petitioner had a significant increase in negative income.

On appeal, counsel for the petitioner asserts that the ability of the petitioner to pay the proffered wage should not be an issue in this matter because in this matter "a foreign family run business has invested their own personal funds to set up and establish the petitioning corporation." Counsel also submits: (1) a copy of a bank statement for a certificate of deposit "held by family members of [the petitioner] & [the petitioner's claimed parent company]; (2) several documents relating to the petitioner's alleged subsidiary; and (3) two documents showing property owned by individuals in Mexico. Counsel contends that these documents show that the family that runs the petitioner and its claimed parent company personally and through their subsidiary corporations has the financial resources to pay the beneficiary the proffered wage.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, the petitioner has not shown that it has paid the beneficiary the proffered wage.

As an alternate means of determining the petitioner's ability to pay, CIS will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*,

623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held the Immigration and Naturalization Service (now CIS) had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that [CIS] should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; *see also Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

As the petition's priority date falls on November 25, 2002, CIS must examine the petitioner's tax return for 2002. The petitioner's IRS Form 1120-A for calendar year 2002 presents a negative net taxable income of $30,094. The petitioner could not pay the difference between the beneficiary's actual 2002 salary of $14,400 and the proffered wage of $50,000 per year out of this income.

Finally, if the petitioner does not have sufficient net income to pay the proffered salary, the AAO will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Net current assets identify the amount of "liquidity" that the petitioner has as of the date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the AAO is satisfied that the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage. In this matter, the petitioner shows $30,166 in net current assets on its 2002 IRS Form 1120-A. The petitioner does not have sufficient liquid funds to pay the beneficiary the proffered wage or the difference between the beneficiary's actual 2002 salary of $14,400 and the proffered wage of $50,000 per year.

Counsel's assertion that the petitioner is a family run business that has used their personal funds to set up and establish the petitioning corporation does not establish that the petitioner has the ability to pay the beneficiary the proffered wage. Moreover, counsel's assertion undercuts the petitioner's claim that it is a wholly owned subsidiary of a foreign entity. A corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Further, the petitioner provided no evidence that the claimed parent company was obligated to support the petitioner financially, including the payment of the beneficiary's proffered wage.

Counsel's submission of documents on this issue on appeal is not relevant and is not timely. Documents relating to third party companies do not establish the petitioner's ability to pay the beneficiary the proffered wage; and, as determined previously, evidence requested by the director and provided for the first time on appeal, will not be considered. *Matter of Soriano, supra.*

Beyond the decision of the director, the petitioner has not provided a comprehensive description of the proffered position. When examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co.,*

Ltd. v. Sava, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). In this matter, the petitioner's general statements regarding the beneficiary's proposed assignment are not sufficient. For this additional reason the petition will not be approved. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.